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No. 86-1912

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

v.

FRED HOLLY, et ux, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT STATE OF WASHINGTON IN OPPOSITION

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40 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the doctrine of exhaustion of remedies, as announced in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S.___, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), restricts a federal district court from determining the validity of the actions of officials of an Indian tribe in adopting a water code when (a) there is no pending proceeding in a tribal forum involving the same parties and the same dispute, or (b) for reasons of "futility," the determination of the validity of the challenged code would be made by the same tribal entity that approved, by express provision of the tribal ordinance, the validity of the code.

2. Whether the immunity of an Indian tribe from suit will bar a suit in federal district court against tribal council members, as individuals, when they take actions that are beyond the powers of their office or implement those powers in an unconstitutional manner.

3. The following question is fairly included, within the meaning of Rule 21.1 of this Court, by question 2 of the Statement of Questions Presented in the Petition for a Writ of Certiorari (as rephrased by Respondent State of Washington in question 2, *supra*):[1]

> Whether the Yakima Indian Nation, as the beneficiary of usufructuary interests in water moving through the Yakima Indian Reservation under the "reserved rights" doctrine of *Winters v. United States*, 207 U. S. 564 (1908), is empowered to enact a comprehensive water rights allocation code that applies to *all* surface and ground waters within the Yakima Indian Reservation, including waters that (a) are *not* required to satisfy the exercise of tribal usufructuary water rights recognized under the *Winters* doctrine, and (b) are required to satisfy vested water rights,

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[1]A discussion of the rationale for the conclusion that this question is fairly included is contained on pages 10-12, *infra*.

held by non-Indian residents of the Reservation, established pursuant to either state or federal law?[2]

[2]For purposes of this brief, "non-Indian" means any person who is not an Indian, or who is an Indian *but* not a member of the Yakima Indian Nation.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
TREATIES AND STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT—REASONS FOR DENYING THE PETITION	7
CONCLUSION	12
APPENDIX 1 - Resolution T-79-77, Yakima Nation Water Code	A-1

TABLE OF AUTHORITIES

CASES

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). 3, 4
California v. United States, 438 U.S. 645 (1978) 2
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 2, 3
Department of Ecology v. Acquavella, 100 Wn.2d 651, 674 P.2d 160 (1983) 4
Ex parte Young, 209 U.S. 123 (1908) 10
Iowa Mutual Insurance Company v. LaPlante, 480 U.S. ___, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987) 1, 7, 8, 9
Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682 (1949) 9, 10
Montana v. United States, 450 U.S. 544 (1981) 9, 12
National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 1, 7, 8, 9
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 9, 10
Snow v. Quinault Indian Tribe, 709 F.2d 1319 (9th Cir. 1983) *cert. denied*, 467 U.S. 1214 (1984) 10
United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) 2, 11, 12
United States v. New Mexico, 438 U.S. 696 (1978) 2
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 3
Winters v. United States, 207 U.S. 564 (1908) 1, 4

STATUTES AND TREATIES

FEDERAL STATUTES

	Page
25 U.S.C. § 331 *et seq.* (1982)	3
25 U.S.C. §§ 1301-1303 (1970)	9
43 U.S.C. § 666 (1982)	2, 3
Homestead Act of 1862 (ch. 75, 12 Stat. 392)	3

STATE STATUTES

RCW 90.03.110 *et seq*

INDIAN CODE

Water Code of the Yakima Nation, Resolution T-79-77 ..... passim

TREATIES

1855 Treaty with the Yakimas (12 Stat. 951) 3

MISCELLANEOUS

U.S. Sup. Ct. Rule 21.1 ..... i, 11

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, State of Washington, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. However if the petition is granted, the Court is requested to set forth expressly as a question, to be briefed and argued by the parties and to be resolved by this Court, question 3 on page i hereof, on the basis that it is a question fairly included in the questions presented by the Petition for Writ Certiorari.

OPINIONS BELOW

The opinions below are adequately set forth in the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

TREATIES AND STATUTES INVOLVED

The Water Code of the Yakima Indian Nation involved, Resolution T-79-77, is set forth in Appendix 1 (beginning at p. A-1).

COUNTERSTATEMENT OF THE CASE

The Historical Role of Primacy of State Water Right Laws and the Federal "Deference" Policy

Since the earliest days of settlement of the western states, federal policy has consistently been one of deference to the states in the enactment of water rights law and in the establishment and regulation of water rights thereunder. See *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978). This century-old policy of state water law primacy, founded on the overriding need for a unitary system of management and regulation of a transitory resource by a single administrator,[3] is so extensive that today many major federal activities, whether operated by the United States directly or through federal licensees, must look to state laws to obtain needed water rights. See *California v. United States, supra*. Indeed, state water rights laws are relied upon by the United States itself to satisfy various water right needs for federal lands, including *both* non-Indian and Indian reserved lands. See *United States v. New Mexico, supra*; *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).[4] Further, even water rights which are established under federal law rather than state law, *i.e.*,

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[3]See 43 U.S.C. § 666 (1982); and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[4]In *Anderson, supra*, the Ninth Circuit Court of Appeals affirmed a district court "general adjudication" decree that confirmed the validity of a water right claimed by the United States, *established under state law*, authorizing both a diversion and a beneficial use of water within the Spokane Indian Reservation for a fish hatchery owned by the United States.

"reserved" rights, have been as a matter of federal policy administered through the mechanisms of state law. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); and 43 U.S.C. § 666 (1982).

History of the Reservation—Present Landownership, Population and State Water Right Patterns

The Yakima Indian Reservation (hereafter "Reservation"), which is located primarily in the agriculturally rich Yakima River Basin of Washington, was established in 1855 by the United States pursuant to the Treaty with the Yakimas. 12 Stat. 951 (1855). See Pet. App. H, p. 41a. Over the past century, consistent with federal policies promoting non-Indian settlement of this Reservation of approximately 1,300,000 acres, ownership of lands within the Reservation has been transferred to non-Indians primarily pursuant to the Allotment Act of 1887, 25 U.S. C. § 331 *et seq.* (1982), and the Homestead Act of 1862, ch. 75, 12 Stat. 392. Thus, today, the Yakima Indian Reservation is not an enclave held exclusively for the use of tribal members.

At present, approximately eighty percent of the residents of the Reservation are non-Indians and approximately twenty percent of the lands of the Reservation are owned by non-Indians. See Pet., App. H, p. 4; *see Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). As to water use, these non-Indian residents of the Reservation have relied upon Washington's comprehensive water right laws for the establishment of water rights needed to carry on various activities within the Reservation. See Pet., App. H, p. 43a. This long-standing application of Washington's "codes" within the Reservation has included six decades of continuous regulation of the exercise of water rights held by many of the non-Indian residents of the Reservation who are plaintiffs in this litigation. This state regulation has been performed pursuant to a state court decree entered in

a "general adjudication" of water rights. See Pet. App. H, p. 43a-44a.[5]

The Scope and Purported Effect of the Tribal Water Code

On or about May 9, 1977, tribal officials of the Yakima Indian Nation (appellants here; hereafter "Tribal Officials") adopted by Resolution T-79-77, the "Yakima Nation Water Code" (hereafter "Water Code"). See App. 1.

This comprehensive Water Code, which controls water use throughout the Reservation, is extraordinary in numerous aspects. *First*, it applies to the entirety of the Yakima Reservation and to all water uses thereon by Indians and non-Indians alike. Thus, the Water Code's reach extends even to those waters on non-Indian owned land that are not required by the Tribe to satisfy the exercise of usufructuary interests in water recognized under the "reservation" doctrine of *Winters v. United States*, 207 U.S. 564 (1908). See App. 1, p. A-1, § I, p. A-4 and § III, p. A-7. *Second*, the Water Code includes a provision which mandates that all persons (with minor exceptions)[6] "using or claiming the right to withdraw or divert" waters on the Yakima Indian Reservation must file with the Chairman of the Yakima Tribal Council a "statement" of claim of a water right by December 31, 1987. See App. 1, §§ IV, V, and VI, pp. A-8, A-9. If this statement is not filed by that date, the water rights of said persons would be automatically "relinquished." See App. 1, § VIII, p. A-11. Thus, in terms of impact on existing rights, the Water Code's cutting edge *extinguishes* water

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[5]We note that the water rights of the Yakima Tribe relating to the Yakima River which flows through the reservation, are presently being subjected to confirmation and quantification in a state court "general adjudication" proceeding conducted pursuant to RCW 90.03.110 *et seq.*, a portion of the state's water code. See, e.g. *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983). See, generally, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[6]See App. 1, § IX, p. A-11.

rights established under state law that have been long relied upon, exercised and used by non-Indians owning lands within the reservation. *Third*, the Water Code's "priority" criteria for making decisions as to how water will be used in the future within the Reservation is based, in primary part, upon the race of the individual landowner upon whose land the water is proposed to be used. See App. 1, § II, p. A-5 and § XIV, pp. A-16. *Fourth*, with the Water Code's establishment of the sole and exclusive methods for obtaining permission to use surface waters (by "permit") or ground waters (by "contract") within the reservation, the Water Code intrudes preemptively into an area of law occupied historically by water right laws of Washington enacted in accordance with the fundamental federal policy promoting the primacy of state water right law. See App. 1, §§ XV, XVII, pp. A-19, A-20.

History of this Litigation

It was against this background that on January 6, 1978 the State of Washington, together with fifty-two non-Indian residents of the reservation, two municipalities located within the Reservation established under state law (the cities of Toppenish and Wapato), and a public corporation also established under state law (Public Utility District No. 1 of Klickitat County),[7] filed an action challenging the Water Code in the United States District Court for the Eastern District of Washington. This action was filed as a test case in order to reduce the serious frictions that were rapidly increasing over the control and use of water, both within and without the Reservation, occasioned by enactment of the tribal Water Code.

The primary issue raised for resolution was an issue of first impression in the area of water rights law: namely, the authority of officials of an Indian tribe to adopt a comprehensive water rights code, applicable to all waters

[7]All of these plaintiffs (respondents here) own land and divert water (based on state rights) within the Reservation. The individual plaintiffs reside on the Glenwood area of reservation, which is predominately non-Indian in population.

within the Reservation, with its intrusive, preemptive, and confiscatory features.

The plaintiffs' complaint requested that the district court declare the Water Code invalid. The grounds supporting this request included, among others, a lack of tribal power to adopt such a comprehensive Water Code as well as various conflicts with provisions of the United States Constitution, including the due process and equal protection clauses of the Fourteenth Amendment and the "taking" clause of the Fifth Amendment.

The Tribal Officers' response to the plaintiffs' complaint, detailed on pages 4 and 5 of the Petition to which this brief responds, raised (by a motion to dismiss) the following threshold challenges to the district court's jurisdiction: (1) the tribal officers were immune from suit, (2) the plaintiffs failed to exhaust tribal remedies, (3) the plaintiffs lacked standing, and (4) there was no justiciable controversy. The two district court judges and the two panels of the court of appeals that examined these threshold issues have rejected them, as follows:

1. On January 31, 1979, the district court (Judge Marshall A. Neill) rejected the four jurisdictional challenges of the Tribal Offices just described (*see* Pet., App. D, p. 24a-32a);

2. That action was reaffirmed by the district court (Judge Justin A. Quackenbush) on September 17, 1983 and November 28, 1983;

3. On appeal, the Court of Appeals for the Ninth Circuit, by Memorandum dated October 12, 1984, affirmed the district court rulings on the four threshold issues (see Pet., App. B., pp. 9a-10a);

4. On remand to the district court, the Tribal Officers once again raised threshold jurisdiction issues, including the "exhaustion" issue. On September 6, 1985, the district court again rejected the Tribal Officers' contentions; (see Pet. App. C, p. 13a); and,

5. Finally, the Ninth Circuit, on March 3, 1987, rejected the Tribal Officers' second request for review of their threshold issues contentions based upon the doctrine of "law of the case." (See Pet. App. A, pp. 2a, 3a.)

As to the issues involving the power of a tribe to adopt the comprehensive "water code" and to apply it to "excess waters," the court of appeals affirmed the district court's declaration that the "Yakima Nation Water Code is invalid to the extent it purports to bestow tribal civil regulatory authority over such use of excess waters." See Pet., App. C, p. 19a.[8]

REASONS FOR DENYING THE PETITION

For the following reasons the rulings of the Ninth Circuit challenged by the Tribal Officers are not in conflict with the rulings of this Court. To the contrary, they are consistent therewith. The two contentions of the Tribal Officers, (1) exhaustion of tribal remedies and (2) tribal immunity, lack merit.

1. The Decisions of the Ninth Circuit Are Not In Conflict With Decisions Of This Court.

a. Exhaustion of Tribal Remedies.

The Tribal Officers rely on *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante* 480 U.S.___, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), for the proposition that it is premature for a district court to determine that an Indian tribe has exceeded its authority until tribal remedies have been exhausted. Pet. p. 7. This reliance on *Crow Tribe* and *LaPlante* is completely misplaced. Those cases hold that, if at the time a federal district court suit is initiated a proceeding involving the same parties and the same dispute is already pending in a tribal court (which includes a challenge to the tribal court's jurisdiction to resolve that dispute), the federal court should not exercise its jurisdiction to resolve that

[8]The Tribal Officials appear to suggest that, because of the exercise of tribal discretion, their Water Code has not been enforced. In order to prevent any possible misunderstanding, the Court is advised that the Water Code has been stayed from enforcement by the district court (at the request of the respondents) since the Code's effective date. (E.R. 93, C.R. 43, 47; C.R. 54, 56, 86.)

challenge until the tribal court itself has been given a full opportunity to determine its own jurisdiction. See, *LaPlante*, 94 L.Ed.2d at 16, 20, n.8, 107 S. Ct. at 974, 976, n.8. This "concurrency" teaching of *LaPlante* has no applicability to a case, such as this one, where there is *no* counterpart case pending in tribal court (or other tribal forum) that would place the district court in a direct competitive position with a tribal entity.

Furthermore, even assuming *arguendo* that this case is in a concurrent jurisdiction posture, the "exhaustion" rule of *LaPlante* and *Crow Tribe* has no applicability where exhaustion would be "futile." *Crow Tribe*, 471 U.S. at 856, n. 21. As the court of appeals succinctly and persuasively stated in its Memorandum decision of September 6, 1984:

> [T]o require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an entirely futile gesture.

Pet., App. B, p. 10a. This analysis of the court of appeals was written as to the self-executing Water Code enacted by the Tribal Officials that left no discretion, of pertinence here, to its implementing officers. See App. 1, p. A-11. That is, as described earlier, vested water rights (e.g., rights established under state law), are "relinquished" automatically, as matter of the operation of the water code, if a person holding such a right does not file a "statement of application" with the tribal court. Furthermore, in any exhaustion context, the Tribal Officials implementing the Water Code are left with no room to interpret the scope of the Water Code's coverage, for the Water Code sets forth, expressly and unambiguously, not only the purported tribal authority for its enactment but, as well, its all-encompassing application to all persons, to the entirety of the Reservation, and to all waters therein. In this context, especially where the ultimate review under the code would be performed by the same tribal body that enacted it, i.e., the tribal council, the futility exception to the rule of exhaustion applies. See App. 1, § XVII, p. A-20.

Montana v. United States, 450 U.S. 544 (1981), controls the processing of this case in its present posture. In *Montana*, as here, an Indian tribe, relying on its powers of "inherent sovereignty," adopted a resolution (Crow Tribe Resolution No. 74-5) relating to the regulation of natural resources, i.e., the regulation of fish and wildlife located within the reservation. Shortly after its adoption, the United States initiated a suit in federal district court to test the validity of the tribal ordinance through a request for declaratory judgment. No competitive proceeding was pending in any tribal forum. In this context, this Court granted review of the lower court's decision and ruled upon the tribal ordinance's validity.

This case mirrors the procedural posture of *Montana*. Shortly after the Yakima Tribal Water Code (which regulates all surface and ground waters located within the Resevation) was adopted, the State of Washington initiated a suit to test the validity of the Water Code. No competitive proceeding was pending in a tribal forum.

In sum, the procedures of *Montana*, not *LaPlante* and *Crow Tribe*, point the way as to the appropriate means for processing of this case. The procedural rulings announced and followed in the lower courts are faithful to relevant precedents of this Court.

b. **Tribal Immunity.**

Contrary to the Tribal Officers' position that the Ninth Circuit decision is in conflict with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Ninth Circuit's ruling follows the rulings of this Court on sovereign immunity from suit, including *Martinez*. *Martinez* holds that neither the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1970), nor, apparently, any other federal statute waived an Indian tribe's immunity from suit in federal courts. However, *Martinez*, 436 U.S. at 59, emphasizes that individual tribal officers are not "protected by the Tribe's immunity from suit" when they act outside of their authority or when the authority under

which they act is void. This accords with the longstanding doctrine, announced in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), that sovereign immunity will not bar a suit against a government official as an individual if the official's actions are not within the powers of the official's office. See also *Ex parte Young*, 209 U.S. 123 (1980), which was cited and relied upon in *Martinez*, 436 U.S. at 59.

In this case, the respondents (plaintiffs below) alleged that the Tribal Officers' actions in adopting the Water Code were not only actions that exceeded their powers under federal law, but were constitutionally invalid. Therefore, consistent with *Martinez* and *Larson*, the Ninth Circuit ruled correctly when it affirmed the district court's conclusion that claims against tribal officers in their individual capacities, when so acting, are not barred from suit by tribal immunity.

2. If the Court Grants the Petition, Question 3 of the Counterstatement of the Questions Presented, Pertaining to the Validity of the Tribal Water Code, Should Be Accepted for Review and Resolution by this Court.

A further comment regarding the immunity issue is necessary. In the "Restatement of Questions Presented," we noted briefly the direct relationship between (1) the respondents' contention that the Tribal Officers acted outside of their powers by enacting the Water Code, and (2) the issue of tribal immunity raised by the Tribal Officers. In this case, the district court ruled (and the court of appeals affirmed) that the Tribal Officials acted outside of their power when they adopted the Water Code which in accordance with its terms, applied to "excess waters" with the Reservation, i.e., to waters above those necessary to satisfy the exercise of tribal "reserved" rights. Pet. App. A, p. 7a, and App. C, pp. 19a, 22a. (This ruling was required in order to determine whether the action of the Tribal Officers was within their power and, thus, protected from suit by "immunity." See *Snow v. Quinault*

Indian Tribe, 709 F.2d 1319, 1322, (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984.) By this ruling, the denial of a motion to dismiss on sovereign immunity grounds was decided properly.

The Tribal Officers have not expressly petitioned the Court to review this *primary* issue dealt with by the contesting parties and the lower courts; namely, the exhaustively briefed and vigorously argued issues pertaining to the validity of the tribal Water Code. However, in order to resolve the tribal immunity issue expressly raised by the petitioners the issue of the tribal Code's validity must be decided by this Court. The immunity question and the question of the validity of the Water Code's application to excess waters are inextricably linked and, indeed, are for all practical purposes one and the same. Accordingly, the latter issue is "fairly included" by the Tribal Officer's petition as an issue for resolution by this Court if the Petition for Writ of Certiorari is granted as to the two issues expressly set forth in that petition. *See* U.S. Sup. Ct. Rule 21.1.

This explanation is provided because, if the pending Petition for Writ of Certiorari is granted, it is clearly appropriate, if not mandatory, for this Court to resolve the issue of the Water Code's validity. Acceptance of this necessarily implicated issue would also resolve a significant issue of water law that needs resolution at an early date. There are rapidly increasing tensions and conflicts over water use in the arid west resulting from the ill-conceived intrusion of tribal water codes directly into areas of water rights law and administration occupied historically by states. Those intrusions threaten to undo the unitary, comprehensive state property system for water allocation that has been long relied upon by large and small water users alike in the Yakima Valley of Washington and other similarly situated water-short valleys in the arid west. See, e.g., *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Additionally, policies of both judicial economy and the alleviation of economic hardship on litigants (e.g., small-farm owning respondents) support resolution of the issue of the Water

Code's validity at this time. By not expressly requesting review of the primary issue dealt with by the lower courts, the Tribal Officers have triggered a most unsatisfactory process for resolution of the important issues of this case that, unless rectified, threatens to place a heavy cloud of extended litigation, lingering on for years if not decades, over constitutionally protected property interests held by property owners with limited financial resources.

To submit that this question is important is not, however, to suggest that it necessarily merits review by this Court; for the decision of the Court of Appeals on the question of tribal authority is clearly correct. In ruling on that question, the Court of Appeals followed its decision in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). *Anderson*, in turn, applied the criteria for determining the validity of an assertion of tribal jurisdiction over non-Indians as established by this Court in *Montana v. United States*, 450 U.S. 544 (1981). See Pet. 3a-7a for the Court of Appeals' discussion of *Anderson* and *Montana*. As there noted:

> The court [in *Anderson*] found no consensual agreement between the tribe and the non-Indian water users or conduct which threatened or had such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe,' as to confer tribal jurisdiction." *Anderson*, 736 F.2d at 1365 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

Pet., App. A, p. 4a.

So too here, for the same reasons as in *Anderson*, the *Montana* criteria for jurisdiction over non-tribal members are clearly not met. Further, in *Montana*, the Tribe was attempting to reserve for its own members all fish and wildlife within the reservation, including those found on non-Indian lands. Here, the Yakima Nation is attempting to do essentially the same thing with respect to excess waters.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied. However, if the

Petition is granted, the Court is requested to expressly set forth as an issue to be resolved by this Court the issue necessarily implicated (as described in question 3 on page i hereof) by the express issues contained in the "Petition for a Writ of Certiorari."

Dated: July 27, 1987.

Respectfully submitted,

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APPENDIX 1
RESOLUTION T-79-77
YAKIMA NATION WATER CODE

AWARE of the terms of the *Treaty with the Yakimas*, (12 Stat. 951), and the "Record of the Proceedings of the Walla Walla Treaty Council" which provide that the Yakima Indian Reservation shall be reserved by the Yakima Nation for the purpose of establishing an independent exclusive political and economic community for members of the Yakima Nation; the Yakima Nation is hereby establishing a water code covering all of the waters that arise on, border, traverse, or underlie the Yakima Indian Reservation establishing all rights, title and interest in said waters and regulating the use thereof. Some applicable portions of the Treaty and Record of Proceedings are as follows:

"**Reservation.**

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit;

Boundaries.

Commencing on the Yakama River, at the mouth of the Attah-num River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains, thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers, thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart and, so far as necessary, surveyed and marked table.

Before you met my brother and myself in council, you have your own council; and the Great Father when he acts has his council also, he has his chiefs.

When I saw the Great Father he called his chiefs together, and had a council about you. He has two chiefs who have the care of the red men, their names are Gen'l Orr and Robert Johnson, and I want you to remember

them. Robert Johnson lives near John Ross; they both told me that what had been done for John Ross should be done for you, and more as I will tell you.

As we grow older we learn more and grow wiser; so of the Great Father and his chiefs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had farmers, they had doctors. I repeat again no white man could go there unless the red man consented to it. * * *

There are other tracts of land East of the Mountains set apart for the red man's home; for there are many tribes. Those tracts the white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers, and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field: the Great Father and his chiefs now think that is not good: the Great Father said, the white man has his farm, his cattle and his horses; the red man shall have his farm, his cattle and his horses; the Great Father says that when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children. * * *

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and you daughters will then teach their children those (fol. 106) who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics: besides this we want on each tract a saw mill and a grist mill.

Now we want you to agree with us to such a state of things; You have your tract with all these things; the rest to be the Great Father's for his white children." (Folio.

105-106, Transcript of Treaty Proceedings).

Governor Stevens said:

"I have a word to say in answer to the remarks of Skloom. Proposals have been made for the lands of the Yakimas and their neighbors; a place has been pointed out for the Yakimas to live in; outside of this place the gardens and farms are to be paid for in money in a fair value. The price paid will probably be a good deal more then the price he has mentioned for those gardens. I say to Skloom, we do sell good lands for Eight Hundred Dollars a mile, but not in this country. We do not expect to sell any of this land." (Record of Treaty Proceedings, Folio 135).

"April 3rd, Tuesday, at 10:00 a.m., the Indians had assembled to the number of 200 and the chiefs were present viz Te-ay-as, Owhi, Kam-i-ah-kun, Shaw-a-way and Skloom. Revd. M.C. Pandosy was also present by my invitation. The council was opened and I proceeded to explain to them why they had been called together; the objects had in view by the Government in desiring to treat with them, and the general nature of the Treaty, it was proposed to hold with them. The government desired to purchase all their country. One or more reservations would be set aside for their use and to belong to them forever. Upon the reservation they would be required to live. There they could build their houses, cultivate farms, and pasture their cattle and horses." (Journal of James Doty, Secretary of Treaties for Washington Territory.)

Aware of the Yakima Nation's inherent sovereignty and right of self government and the right to make its own laws as specified in the Treaty Proceedings at Walla Walla, as quoted above, the Yakima Nation does hereby promulgate its water code for the purpose of using, conserving and preserving, regulating its reserved water rights in all waters, arising on, bordering, traversing or underlying the Yakima Reservation for the purpose of using the Yakima Indian Reservation as a permanent, viable home and abiding place for the Yakima Indian Nation and its members.

CONSCIOUS of the basic law which provides that water which border, traverse, arise on, or underlie Indian reservations is reserved for the use of Indians on said reservations, the Yakima Nation does promulgate this water code for the purpose of regulating, using, preserving, conserving, allocat-

ing and using the reserved water guaranteed by treaty. This right is founded on the reservation by treaty of the lands and other natural resources like water to allow Indians within that reservation to maintain a viable Indian community. *United States v. Ahtanum Water District*, 236 F. 2d 321 (C.A. 9-1956); Cert. denied 352 U.S. 988 (1956); 330 F. 2d 897, (C.A. 9-1965) 338 F. 2d 307 (C.A. 9-1965); Cert. denied 381 U.S. 924 (1965); *Winters v. United States*, 207 U.S. 564, (1908). In likewise specific terms, it has been judicially decreed in *United States v. Ahtanum Irrigation District*, *supra*, that the Yakimas use to the waters is not subject to appropriation, acquisition or administration under state laws. The Secretary of Interior has likewise failed and refused for some 89 years to promulgate any rules for the just and equal distribution among the Indians residing on the reservations other than those contained within established irrigation projects and has made no provisions for the distribution or regulation of any ground waters.

AWARE of these facts and law, the Yakima Nation does hereby promulgate its water code for the purpose of regulating, administering, preserving and conserving these reserved waters within the Yakima Indian Reservation in the best interests of said Yakima Indian Reservation as a viable Indian community as established in the *Treaty with the Yakimas.*

NOW, THEREFORE, BE IT RESOLVED, by the Yakima Tribal Council as follows:

I.
PROCLAMATION ANNOUNCING TITLE OF THE YAKIMA INDIAN NATION TO ALL RIGHTS TO THE USE OF WATER THAT BORDERS, TRAVERSES, ARISES UPON OR UNDERLIES THE YAKIMA INDIAN RESERVATION.

KNOW ALL MEN BY THESE PRESENTS that:

The Yakima Indian Nation is the owner of all the full equitable title to the rights and to the use of all the water resources which arise upon, border, traverse, or underlie the Yakima Indian Reservation. The United States can hold only the naked legal title to these rights to the use of water acting

only as trustee in a fiduciary relationship with the Yakima Indian Nation and its members. The full equitable title of the Yakima Indian Nation to its reservation and resources (which title includes the rights to the use of all water resources upon the reservation, repeatedly recognized by the courts and Congress) reside undiminished in the Yakima Nation. The United States of America is legally responsible to preserve, protect, conserve the rights of the use of water above described solely for the benefit of the Yakiam [sic.] Indian Nation and its members. The Yakima Indian Nation has the legal responsibility to preserve, protect, conserve and equitably administer and regulate the use of said waters.

The Yakima Indian Nation has previously proclaimed the right to regulate waters in Resolution T-5-70.

II.
PURPOSE AND PRIORITIES

The future growth and development of the Yakima Reservation and the Yakima Nation is dependent upon affective management and efficient use of the Yakima Nation's reserved water resources. These regulations are adopted to provide adequate records for efficient administration of the Yakima Nation's water and in order to protect and conserve the water supply reserved by Indians of the Yakima Indian Reservation.

These regulations in this resolution set forth the policies and administrative procedures that will be adhered to in allocating the use of waters so reserved. The first priority for the use of waters shall be for a public or tribal use when so dedicated by the governing body of the Yakima Indian Nation. The next priority shall be to secure a just and equal distribution of those reserved waters for the Yakima members residing on the reservation, farming or otherwise using their allotments in their own enterprise and for allotments being farmed or otherwise used by the Yakima Indian Nation. If there be waters available after these lands have been furnished with adequate waters, then the next priority shall be for a just and equal distribution among Tribal allotments and among allotments of Yakima members holding trust restricted or allotted lands who do not farm or use their lands

in their own enterprise. If there be waters available after these lands have received an adequate amount, then the next priority shall be among Yakima members holding trust restricted or allotted lands who do not live on the reservation. If there be waters available after these lands have received an adequate amount, then the next priority shall be for a just and equal distribution among lands held by Yakima members that are not in a trust or restricted status. If there be waters available for use after these lands have received adequate water, then the next priority shall be for a just and equal distribution among other formally allotted lands on the reservation or among allotments held by Indians who are not members of the Yakima Nation. In determining the distribution of the waters among these non-trust or non-restricted lands specified in the foregoing sentence, the amount of water being used at that time they passed from Indian ownership shall determine and control the amount of water that shall be used on said lands. It is not the purpose of this code to regulate the individual use of water within statutory irrigation projects such as the Wapato-Satus unit, additional works unit, Ahtanum unit, and Toppenish-Simcoe unit of the Wapato Irrigation project where the water is being used or applied pursuant to the direction of the project engineer of the Wapato Project. Where waters are being used within said statutory irrigation projects on the Yakima Reservation within the administration of said project engineer, the United States of America through said project engineer will be responsible to make application and contract with the Yakima Nation in regards to the use of said waters. It is to be understood that it is the purpose of this water code to provide for a system whereby the project engineer will negotiate and contract with the use of reserved waters with the Yakima Nation on a collective basis and will then be responsible for the regulation and the use of said collective waters within said statutory irrigation projects.

III.
DEFINITIONS

Unless a different meaning is plainly required by the context of this resolution, the following words and phrases

used in this resolution shall have the following meanings.

(1) "Person [sic.] shall mean an individual, partnership, association, public or private corporation, city or other municipality, county or a state agency, and the United States of America using or claiming water rights reserved by the Yakima Nation.

(2) "Beneficial Use" shall include, but not be limited to, use of domestic water, livestock irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial water, generation of electric power, and navigation.

(3) "Ground waters." All waters that exist between the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of the Yakima Indian Reservation, whatever may be the geological formation or structure in which water stands or flows, percolates or otherwise moves.

(4) "Yakima Member or Member" shall mean any member of the Yakima Nation enrolled under the act of August 9, 1946, as amended (60 Stat. 969, 25 USC 601 and following).

(5) "Indian" shall mean any enrolled member of an Indian tribe recognized by the United States of America.

(6) "Reserved Waters" mean those waters, arising on, flowing through, underlying or bordering the Yakima Indian Reservation. This shall include both ground and surface waters, springs, wells natural lakes and ponds.

(7) "Just and equitable distribution" means a method of allocation of the available reservation waters in conformity with the purpose of the Yakima nation among those using them in such a manner that those in the same class and similarly situated will be given a equal opportunity to make beneficial use of the water.

(8) "Beneficial use" means any use of water, by consumption or otherwise, including but not limited to industrial, domestic, or agricultural purposes.

(9) "Project Engineer" shall be an engineer of the Bureau of Indian Affairs who is authorized to administer the Wapato Irrigation Project.

IV.
CLAIM OF RIGHT TO WITHDRAW, DIVERT OR USE GROUND OR SURFACE WATERS—FILING OF CLAIM REQUIRED—EXEMPTIONS

All persons using or claiming the right to withdraw or divert and make beneficial use, of surface or ground waters on the Yakima Indian Reservation, except as hereafter exempted from compliance in this resolution, shall file with the Chairman of the Yakima Tribal Council, not later than December 31, 1977, a statement of application for use for each water use or claim on a form provided by the Yakima Tribal Council.

V.
STATEMENT OF CLAIM—CONTENTS

Statement of application shall include substantially the following:

1. Name and mailing address and phone number of the applicant.

2. The source of water supply by naming the stream from which water is taken; if the water is from a well, a legal description of the land where the well is located and the approximate location of the well within the lands described.

3. A description of the land where the water is being used and the purpose for which it is being used (for example, household livestock, agriculture, recreation, industrial, municipal, generation of electricity.)

4. The quantities of water and the time of use claimed.

5. The approximate date of first putting water to beneficial use for the various amounts and times claimed in subsection 3.

6. The legal doctrine or doctrines upon which any water right claimed is based including, if statutory, the specific statute.

7. The sworn statement that the application set forth is true and correct to the best of claimants knowledge and belief.

If in the discretion of the Tribal Council or its agents, more complete data is required of the applicant, additional information may be requested by the Yakima Indian Nation.

The filing of the application shall be considered authorization of the Yakima Tribal Council, or their designated agents and representatives, to go upon the lands or properties to the applicant for the purpose of obtaining required information or to verify the information which has been received.

VI.
STATEMENT OF CLAIM--FORM

The statement of claim form furnished by the Tribal Council shall be substantially in the following form:

WATER USE APPLICATION

INFORMATIONAL FILING

Name_____

Address_____

_____ Zip Code_____ Phone No. _____

2. Source From Which the Right to Take and Make Use of Water is Claimed: _____
Surface or Ground Water

_____

A. If Ground Water, the Source is_____

B. If Surface Water, the Source is_____

3. The Quantities of Water and Times of Use Claimed: _____

A. Quantity of Water Claimed_____ Presently Used: _____

_____
(Cubic Feet Per Second or Gallons Per Minute)

B. Annual Quantity Claimed_____ Presently Used: _____

_____
(Acre Feet per Year)

C. If For Irrigation, Acres Claimed_____

Presently Irrigated_____

D. Time(s) During Each Year When Water is Used: _____

4. Date of First Putting Water to Use: Month_____ Year_____

5. Location of the Point(s) of Diversion/Withdrawal: _____

Feet_____ and_____ Feet_____ From the_____

_____ Corner of Section_____

Being Within_____ of Section_____, T. _____

N.R. _____ (E. or W.) W.M.

If This is Within the Limits of a Recorded Platted Property, Lot_____

_____ Block_____ of_____

_____
(Give Name of Plat or Addition)

6. Legal Description of Lands on Which the Water is Used: _____

_____

_____

_____

_____ County_____

7. Purpose(s) For Which Water is Used: _____

8. The Legal Doctrine(s) Upon Which Any Right of Claim is Based: _____

Do Not Use This Space	I hereby swear that the above information is true and accurate to the best of my knowledge and belief.
The filing of a statement of claim does not constitute an adjudication any claimed right to use of waters. This acknowledgement constitutes receipt for the filing fee.	X_____
Dated Returned: This Has Been Assigned Water Right Claim Registry No.	Date: _____ If Claim filed by designated representative, print or type full name and mailing address of agent below.
	_____
	_____
	☐ Additional information relating to water quality and/or well construction is available.

If the foregoing form is not adequate to contain the required information, any form that satisfies the requirements of the foregoing section shall suffice.

VII.
STATEMENT OF APPLICATION—FILING PROCEDURE PROCESSING OF APPLICATION—FEE

The filing of a statement of the application shall take place and be completed upon receipt by the Chairman of the Yakima Tribal Council or his agent, at his office in Toppenish, Washington of an original statement signed by the applicant or his authorized agent, and two copies thereof. Any person required to file herein may file through a designated representative. The United States when furnishing person [sic.] water within statutory irrigation projects on the Yakima Reservation shall have the right to file one claim on behalf of said persons on a form that shall show the total benefits for each person served providing that a separate claim shall be filed by said United States for each operating unit and for each water source. Within thirty days after the receipt of a statement of claim, the Yakima Tribal Council chairman, or his agent, shall acknowledge the same by a notation on one copy indicating receipt thereof and the date of receipt and shall return said copy by prepaid mail to the applicant at the address set forth in the application. No application shall be accepted for filing by the Yakima Tribal Chairman unless accompanied by a $25.00 filing fee.

VIII.
FAILURE TO FILE APPLICATION WAIVES AND RELINQUISHES ANY EXISTING RIGHT

Except as hereinafter provided, any person using or claiming the right to divert, use or withdraw waters on the Yakima Indian Reservation, who fails to file said application as herein provided shall be conclusively deemed to have waived and relinquished any use of said water and any claim for any right, title or interest in said water.

IX.
EXEMPTIONS FROM ACT.

The following uses, withdrawals or diversions are exempt from the provisions of this resolution.

A) Any withdrawal of ground waters for stock watering purposes or for watering of a lawn of a non-commercial garden not exceeding one-half acre in area, or for a single or group domestic use in an amount not exceeding 5,000 gallons a day, or for an industrial puprose [sic.] in an amount not exceeding 5,000 gallons a day, is and shall be exempt from the provisions of this resolution.

B) Any use or diversion by an individual, partnership, association, public or private corporation, city or other municipality, county, state agency in the State of Washington, when claiming that use of and diversion is under the direction within the confines of a statutory irrigation project [sic.] United States of America through the project engineer for the Wapato Irrigation Project where there is no other claim to the use of said water other than the right to receive a delivery through the Wapato Irrigation Project; shall be exempt from the provisions of this resolution.

Provided, that at the option of the party making withdrawal use or diversions of waters as specified in A and B above, applications may be made under this resolution and where made, shall be considered as a request on the part of the applicant to fall within the regulations and regularoty [sic.] power of the Yakima Indian Nation as provided herein.

Provided, that the Yakima Tribal Council, from time to time may require that the person making any such withdrawals as contained in A and B to furnish information as to

the means for and the quantity of that withdrawal, use or diversion.

X.
WATER RIGHTS NOTICE FORM

The Yakima Tribal Council shall, within thirty days, of the enactment of this resolution, give the following notice in writing as hereinafter provided:

> "WATER RIGHTS NOTICE. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency in the State of Washington, the State of Washington and the United States of America when using or claiming the right to use, divert or withdraw waters within the Yakima Reservation, are hereby notified that all water rights or claimed water rights relating to the use, withdrawal or diversion of surface or ground waters within the Yakima Reservation, must be registered with the Yakima Tribal Council, Toppenish, Washington, not later than December 31, 1977. FAILURE TO REGISTER AS REQUIRED BY TRIBAL COUNCIL RESOLUTION WILL RESULT IN A WAIVER AND A RELINQUISHMENT OF SAID USE OF WATER RIGHT OR CLAIMED WATER RIGHT. There are some exemption [sic.] for minor uses of water of less than 5,000 gallons a day and where water is delivered by the Wapato Irrigation Project. For further information contact the Yakima Tribal Council for a copy of the appropriate resolution."

XI.
NOTICE OF RESOLUTION PROVISIONS, HOW GIVEN, REQUIREMENTS.

To insure that all persons referred to in this resolution are notified of the registration provisions of this resolution, the Chairman of the Yakima Tribal Council is directed to give notice of the registration provisions of this resolution as follows:

1) He shall cause said notice in writing to be placed in the Yakima Nation Review, in the Yakima Daily Republic, Toppenish Review, and Wapato Idependent [sic.], as [sic.] least once each week for three consecutive months.

2) He shall cause the above water rights notice to be

mailed in writing to the following addresses within thirty (30) days after the adoption of this resolution:

NEWS MEDIA:
Yakima Herald Republic
P.O. Box 1618
Yakima, Washington 98907

KNDO TV
P.O. Box 466
Yakima, Washington 98907

KIMA Television Center
P.O. Box 702
Yakima, Washington 98907

KMWX Radio
P.O. Box 1460
Yakima, Washington 98907

KBBO Radio
P.O. Box 172
Yakima, Washington 98907

KUTI Radio
P.O. Box 261
Yakima, Washington 98907

KQOT Radio
P.O. Box 1194
Yakima, Washington 98907

KIT Radio
P.O. Box 1222
Yakima, Washington 98907

KAAR Radio
P.O. Box 2795
Yakima, Washington 98907

KAPP TV
P.O. Box 1747
Yakima, Washington 98907

Toppenish Review-Mirror
11 E. Toppenish Avenue
Toppenish, Washington 98948

Tri-City Herald
Pasco. Washington

Prosser Record Bulletin
613 7th
Prosser, Washington

Grandview Herald
107 Division
Grandview, Washington 98930

Others:

Department of Ecology
Olympia, Washington 98501
Attention: Water Resources

Yakima Project
Bureau of Reclamation
Yakima, Washington 98901

3) Within thirty (30) days after the adoption of this resolution, he shall cause a notice in writing to be placed in a prominent and conspicuous location in the Yakima County and Klickitat County Courthouses.

4) He shall also in his discretion give notice in any other manner which will carry out the purposes of this resolution.

XII.
WATER REGISTRY AND DISPOSIITON [sic.] OF APPLICATIONS FOR PERMISSION TO USE WATER

The Yakima Tribal Council shall establish a registry entitled "Water Application Registry." The original copy of all applications delivered pursuant to this resolution shall be filed in the registry alphabetically and shall receive a control number. Each application shall have clearly marked upon the application the date and hour when the application was received at the Tribal Office in Toppenish, Washington.

The second copy of the application for permission to use water within the Yakima Indian Reservation, will be separated and segregated by authorized personnel on the basis of subwater shed, stream system or other common source of

supply. These applications shall be filed in the order in which they were received and dated as provided above.

XIII.
WATER RESOURCES BOARD

The Yakima Indian Nation, acting through its Yakima Tribal Council, will appoint a water resources board consisting of three (3) persons, which shall include a chairman and two members. The chairman shall be appointed for a term of three years, the second members for a term of two years and the third member for a term of one year. The Yakima Tribal Council will likewise appoint such staff and provide such space as is necessary for the work of said board.

Said board shall have authority to promulgate and provide rules of procedure for adjudications and hearings before said Water Resources Board.

It will be the responsibility of the water resources board to determine whether the Yakima Indian Nation will permit water to be used, withdrawn or diverted by the applicants who have made filings as required in this resolution.

The Water Resources Board shall, as the principal agent of the Yakima Nation, protect, preserve, conserve and regulate the use of the Nation's right to use of water and make determinations respecting the permission of the use of water within the Yakima Indian Reservation. In the performance of these duties, the Water Resources Board is authorized and directed to utilize in addition to the employess [sic.] of the Waters Resources Board the technical services respecting hydrology, land use, geology and related pertinent sciences, which the Yakima Nation presently provides and all available qualified personnel of the Bureau of the Indian Affairs. In the event expert advice for assistance in regards to the performance of its functions is not presently available, the Water Resources Board, is authorized to contract for those services. Any such contract must be approved by the Yakima Tribal Council.

XIV.
CLASSIFICATIONS, PRIORITY, STANDARDS AND CRITERIA GOVERNING WATER BOARDS DETERMINATION

In making its determination as to whether an application for permission to use water resources of the Yakima Indian Nation shall be granted or rejected, in whole or in part; the water resources board will be guided by the following classifications, standards, priorities and criteria:

1) The water board shall not take any private property for public use without just compensation. (25 USC 1101).

2) The water board shall not deny to any person the equal protection of laws or deprive any person of liberty or property without due process of law. (25 USC 1101). In following this direction, the water board shall make every effort to give equal and just treatment to all persons within the same classification of use.

3) The Water Board shall consider its primary objective that the Yakima Indian Reservation and the reserved water rights in the Yakima Indian Reservation were reserved for the purpose of establishing the Yakima Indian Reservation as a permanent, viable home and abiding place for the Yakima Indian Nation and its members and for the purpose of providing an independent political and economic community for the Yakima Indian Nation and its members.

4) The following classification and priorities are established and will be adhered to in allocating the use of waters reserved by the Yakima Indian Nation.

A. Class A. **Use.** The first priority for the use of waters shall be for their tribal or public use when their public or tribal use is dedicated by a resolution of the Tribal Council of the Yakima Indian Nation. It is understood and agreed that the Yakima Indian Nation is hereby dedicating the use of all ground waters, except as herein limited, as a tribal enterprise for the purpose of delivery of water to water users within the reservation on a contract basis.

B. Class B. **Use.** If there are waters available after the use above, then for such other purposes as shall be directed by Yakima Tribal Council resolution for tribal enterprise.

C. Class C. **Use.** If there are waters available, after the

use above, then the next priority shall be to secure a just and equal distribution of reserved waters for Yakima members residing on the Yakima Reservation for farming or using their allotments in their personal enterprise and for allotments being farmed by the Yakima Indian Nation.

D. Class D. **Use**. If there are waters available after the uses in A, B and C above have been furnished with adequate waters, then the next priority shall be for a just and equal distribution among tribal allotments and among resident Yakima members holding trust, restricted, or allotted lands who do not farm their lands.

E. Class E. **Use**. If there are waters available after the uses in A, B, C and D above have been furnished with adequate waters, then the next priority shall be among Yakima members holding trust, restricted or allotted lands who do not live on the reservation.

F. Class F. **Use**. If there are waters available after the uses in A, B, C, D and E above have been furnished with an adequate amount, then the next priority shall be for a just and equal distribution among the lands held by Yakima members that are not in a trust or restricted status and among Indians (not Yakima members) who hold lands in a trust or restricted status,

G. Class G. **Use**. If there are waters available after the uses in A, B, C, D, E, and F have received adequate water, then the next priority shall be for a just and equal distribution among other formerly allotted lands on the reservation. In determining the distribution of waters among these Class G lands, the amount of water being so used at the time they passed from Indian ownership shall determine and control the amount of the water that shall be used on said lands.

5. Multi-service diversions and distributions, such as the Wapato project, are to be preferred as incompassing as near as possible all the reserved waters that would be furnished to the uses within such a multi-service diversions or distribution system as would be furnished under the foregoing priorities if individual application was to be made. In making application for a water permit the project engineer shall specify the amount of use contemplated for each user group.

6. Uses of water for domestic, stock watering, industrial,

commercial, agricultural, irrigation, hydro-electric power production, mining, fish and wildlife maintenance and enhancement, recreational and thermal power production purposes, and preservation to environment and esthetic values and all other uses compatible with the creation of a viable, independent Indian community on the Yakima Reservation, are declared to be beneficial.

The Yakima Tribal Council may be [sic.] resolution create a priority type of use in amount or in area by resolution at any time, but this action shall not effect permitted use of lower priority during the term of an existing permit.

7. In evaluating whether the continued use of water by an applicant is for the benefit of the Yakima Indian Naiton [sic.] and the Yakima Reservation, it is essential for the Water Resources Board to consider in addition to other factors, whether an applicant and other applicants to the common source of supply, have overappropriated that source of supply and if complete or partial reduction in the use from that source of supply is essential to avoid the continued over-appropriation.

8. In considering the allocation of water, the Water Resources Board shall take into consideration whether the waters of a particular common source of supply can be better used among the foregoing use classifications for purposes other than those to which the applicant or applicants are presently using the water. In this regard, the Water Resources Board shall follow the list of priorities promulgated by the Yakima Tribal Council.

9. In determining the allocation of water within the various classifications above set forth, the Water Resources Board shall take into consideration the use of water that has been made on the land during the five previous years and not just the immediate use during the calendar year.

10. In granting permits for the use of water to any applicant other than the Yakima Indian Nation, the period of permitted use shall not exceed ten years. At least one year prior to the expiration of said permitted use, the water resources board shall again re-examine the allocations of the water on any common water supply upon application being made by the applicant in the same manner as heretofore originally

provided for. Notice of the necessity to refile for the use of waters shall be sent to all permittees at least 500 days prior to the expiration of their permit at the addresses on their applications. Such notice shall specify the time during which applications must be filed and that the permitted right will expire if no application is filed.

XV.
NO USE WITHOUT PERMIT—TEMPORARY USE, WITHDRAWAL AND DIVERSIONS OF WATER LIMITED TO USE MADE IN 1976 CALENDAR YEAR

After the effective date of this resolution, no use, withdrawal or diversion of surface or ground waters within the Yakima Reservation shall be begun nor shall any well or other works for such withdrawal, use or diversion be constructed; unless a permit to use said waters has been granted by the Yakima Indian Nation. Provided however, that during the year 1978, use, diversion and withdrawal made by any person during the calendar year in 1976 shall be permitted to temporarily continue unless said person has been notified in writing by the Yakima Tribal Council that said use is not permitted.

After June 1, 1978, no use, withdrawals or diversions of surface waters or ground waters within the Yakima Reservation shall be begun, or continue, nor shall any well or other works for such withdrawal use and diversion be constructed, unless an application to use such waters has been made to the Yakima Tribal Council and a permit has been granted as herein provided.

XVI.
HEARINGS ON PERMIT

Prior to granting of any permit or the denial or the limiting of use by the Water Resources Board, of any application, the Board shall have a full hearing upon the subject called specifically for that purpose by the Board. The Board may combine the hearing on any one application with multiple applicants using water from a common source of supply.

Applicants will be given notice in writing addressed to

their address specified in their application and placed in the United States mail, postage prepaid at least thirty days prior to the date set for hearing. The hearing will be conducted by at least a majority of the water board and the applicant will be accorded an opportunity to fully present the basis of his claim and data in support of it. Hearings by the Water Resources Board will be initiated, notices [sic.] and conducted in accordance with the rules of procedure promulgated by the Water Resources Board. At the conclusion of the deliberations by the Water Resources Board, they will notify applicants in writing of their decision.

XVII.
APPEALS

Any applicant who is aggrieved by the decision of the Water Resources Board, may appeal the decision of the Water Resources Board within thirty days of the mailing of the notice of the decision of the Water Resources Board. Said aggrieved party must file his notice of appeal with the Chairman of the Yakima Tribal Council within the said time period. The Yakima Tribal Council will then on the record, consider the appeal and shall render its decision in regard within six months of the decision of the Water Resources Board. The decision of the Yakima Tribal Council will be final.

XVIII.
GROUND WATER ENTERPRISE

The Yakima Indian Nation will establish wells for the withdrawal of all ground waters on the Yakima Indian Reservation with the exception of the limited use exemptions herein specified. All future wells will be drilled or dug by the Yakima Indian Nation on lands in which ownership has been transferred to the Yakima Indian Nation or upon which adequate easements for ingress and egress for the purpose of maintenance and water delivery have been provided. Contracts with users will be made permitting withdrawals of a certain quantity from said wells. Where there are existing wells on the reservation, withdrawing water in excess of the exemptions herein provided, no withdrawals shall be made

after June 1, 1978 until there is a contract for withdrawal made with the Yakima Indian Nation. Said contract regarding existing wells, shall provide for an easement for ingress and egress for maintenance and water delivery regarding said wells or conveyance of the lands in which they are contained and shall provide for reimbursement for the cost of said wells either through the payment of money or the crediting of moneys from the use of said water toward said purchase price.

XIX.
PENALTIES FOR VIOLATION OF CODE

Violation of any provisions of this code or any regulations or proclamations issued thereunder shall be punishable in the Yakima Tribal Court for each and every offense, by a penalty or punishment not greater than imprisonment for a term of six months or $500.00 or both.

PASSED BY A VOTE OF THE YAKIMA TRIBAL COUNCIL at the Yakima Indian Agency at Toppenish, Washington, a quorum being present by a vote of 12 for and none against on this 9th day of May, 1977

/s/
Watson Totus, Chairman
Yakima Tribal Council

ATTEST:

/s/
Joe Sampson, Secretary
Yakima Tribal Council